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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 UNITED STATES OF AMERICA,) No. MJ20-425
7)
8 Plaintiff,) MOTION FOR REVIEW AND
9 v.) REVOCATION OF MAGISTRATE
10 ISAIAH THOMAS WILLOUGHBY,) JUDGE'S DETENTION ORDER AND
11) MEMORANDUM OF LAW IN
12 Defendant.) SUPPORT
) Noted for July 31, 2020
)
)
) (telephonic oral argument requested)

13 The defendant, Isaiah Thomas Willoughby, seeks review of the detention order
14 issued by Magistrate Judge Brian Tsuchida on July 20, 2020, dkt 11, 13, and
15 respectfully moves this Court to reverse the magistrate judge's detention order and
16 promptly release him pending trial with a set of conditions this Court finds acceptable.
17 See 18 U.S.C. § 3145(b); Local Rule W.D. Wash. MJR 11. This Court's review is *de*
18 *novo*.

19 The Bail Reform Act requires that a defendant be released unless no conditions
20 could reasonably assure his future appearance and protect the community. Here, even
21 apart from the COVID-19 pandemic, Mr. Willoughby should be released with
22 conditions. The COVID-19 pandemic simply provides additional weight in favor of
23 releasing Mr. Willoughby.

24 **I. Procedural History**

25 This offense allegedly took place on June 12, 2020, during the CHOP (Capitol
26 Hill Organized Protest) and Black Lives Matter protests in Seattle. Mr. Willoughby is

1 accused of setting fire to a pile of debris outside of the then-abandoned SPD East
 2 Precinct, a building not made of wood or other easily flammable material. Mr.
 3 Willoughby was arrested in Tacoma at his residence on June 18, 2020. He was detained
 4 at the King County Jail.

5 On June 23, 2020, Mr. Willoughby was charged in King County Superior Court
 6 with Arson Second Degree (setting a fire which damages property). After about three
 7 weeks in custody, a community bail fund agreed to post bail for Mr. Willoughby on
 8 July 11, 2020.¹ He was released from custody, but was arrested following a
 9 misdemeanor assault allegation now charged in Seattle Municipal Court.² Mr.
 10 Willoughby was released again after posting bail for that case on Monday, July 13,
 11 2020.

12 After Mr. Willoughby was released twice in state court, the Government file a
 13 federal complaint charging him with Arson, in violation of 18 U.S.C. §§ 844(f)(1) and
 14 844(i), and obtained a warrant for his arrest on July 14, 2020. Dkt 1. Mr. Willoughby
 15 was arrested that afternoon and had an initial appearance on July 15, 2020. Dkt 7.

16 A detention hearing was held on July 20, 2020, before Magistrate Judge Brian
 17 Tsuchida. Dkt 11. At the detention hearings, Mr. Willoughby stressed his strong ties to
 18 this district and the limited nature of his criminal history. *See* Dkt 9; Exhibit
 19 1(Transcript). The Government argued for detention, citing the nature of the offense,
 20 Mr. Willoughby's criminal history, and statements he allegedly made about going to
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22
 23 ¹ The pretrial services report states that Mr. Willoughby bailed out after learning that the U.S.
 24 Attorney's Office was going to file charges against him, implying he was attempting to flee
 25 federal prosecution. The Court should not engage in such speculation. As counsel understands
 26 it, the King County Prosecutor announced, in open court during a hearing, that "the feds" will
 likely take the state case. The county defender sought appointment of counsel for Mr.

Willoughby for the federal case. There was nothing nefarious about this common procedure.
² Just as Mr. Willoughby is presumed innocent of the offense in this case, he is also presumed
 innocent in that case. He denies the conduct alleged in that case.

1 Las Vegas. Exhibit 1 (Transcript). The Court denied Mr. Willoughby's request to be
2 released on bond and ordered that he be detained. Dkt 11, 13.

3 **II. Memorandum of Law in Support of Motion**

4 **A. Standard of Review**

5 This Court's review is *de novo*. See 18 U.S.C. § 3145(b); *United States v.*
6 *Koenig*, 912 F.2d 1190, 1192–93 (9th Cir. 1990). This Court must review the evidence
7 before the magistrate judge and any additional evidence proffered by the parties “and
8 make its own independent determination whether the magistrate's findings are correct
9 with no deference.” *Koenig*, 912 F.2d at 1193.

10 **B. Legal Framework**

11 “Under the Bail Reform Act of 1984, as amended, Congress has determined that
12 any person charged with an offense under the federal criminal laws shall be released
13 pending trial, subject to appropriate conditions. . . .” *United States v. Santos-Flores*, 794
14 F.3d 1088, 1090 (9th Cir. 2015). And, “[o]nly in rare cases should release be denied,
15 and doubts regarding the propriety of release are to be resolved in favor of the
16 defendant.” *Id.* (citing *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985)).
17 See also *United States v. Salerno*, 481 U.S. 739, 755 (1987) (suggesting that “detention
18 prior to trial or without trial is the carefully limited exception” to liberty before trial).
19 One charged with a crime is, after all, presumed innocent. *Stack v. Boyle*, 342 U.S. 1, 4
20 (1951).

21 Under the Bail Reform Act, the Government must show that a defendant poses a
22 danger to the community by clear and convincing evidence, and it must show that a
23 defendant poses a flight risk by a preponderance of the evidence. *United States v.*
24 *Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991); 18 U.S.C. § 3142(f).

25 At the detention hearing, the Government did not allege that Arson is an offense
26 that carries a rebuttal presumption that no combination of conditions will reasonably

1 assure the appearance of a person or the safety of the community. *See* Dkt 3; 18 U.S.C.
 2 §§ 3142(e)(2), 3142(f)(1)(C). In the interests of caution, this issue will, nonetheless, be
 3 addressed. If this presumption is rebutted, the Court must impose “the least restrictive”
 4 condition, or set of conditions, that will create such an assurance. 18 U.S.C. §
 5 3142(c)(1)(B). Even where a defendant bears a burden of production to rebut the
 6 presumption, the Government bears the ultimate burden of persuasion. *United States v.*
 7 *Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008).

8 The burden of production imposed upon the defense is “small;” he need only
 9 present some credible evidence against the presumption of detention. *See United States*
 10 *v. Chen*, 820 F.Supp 1205, 1207-08 (N.D.Cal. 1992); *United States v. Clark*, 791
 11 F.Supp 259, 260 (E.D.Wash. 1992). Any “evidence of economic and social stability”
 12 can rebut the presumption. *United States v. Dominguez*, 783 F.2d 702 (7th Cir. 1986)

13 In this case, Mr. Willoughby has easily presented sufficient evidence to meet his
 14 initial burden of production. The information contained in the Pretrial Services reports
 15 confirm that Mr. Willoughby has longstanding ties to this community and has a recent
 16 history of employment.

17 Once the defendant has met his burden of production, to detain a defendant, the
 18 Government must prove by a preponderance of the evidence that the defendant poses a
 19 flight risk that no condition or combination of conditions can address. *Motamedi*, 767
 20 F.2d at 1407. The clear and convincing burden applicable to a claim of dangerousness
 21 requires evidence that produces in the factfinder “abiding conviction” that the asserted
 22 facts are “highly probable.” *Sophanthavong v. Palmateer*, 378 F.3d 859, 866–67 (9th
 23 Cir. 2004) (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)). So to detain
 24 based on dangerousness, the Court must have an abiding conviction that even with
 25 some combination of conditions, it is highly probable that the defendant poses a danger.
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1 The United States Constitution affords pretrial detainees greater protection from
 2 dangerous conditions of confinement than those sentenced after conviction. *See, e.g.,*
 3 *Hernandez v. County of Monterey*, 110 F. Supp. 3d 929, 934 (N.D. Cal. 2015) (“A jail
 4 violates both [the Fourteenth and Eight Amendments] if it incarcerates inmates under
 5 conditions posing a substantial risk of serious harm to their health or safety . . . and if
 6 [government] acted with deliberate indifference, that is, with conscious disregard for
 7 that risk[.]”); *Morales Feliciano v. Rossello Gonzalez*, 13 F. Supp. 2d 151, 210 (D.P.R.
 8 1998) (“The failure to screen incoming [inmates] for infectious diseases including
 9 tuberculosis” violates the Constitution).

10 Release conditions need only provide “reasonable assurance” and it is reversible
 11 error to detain a defendant in order to “guarantee” community safety. *United States v.*
 12 *Orta*, 760 F.2d 887, 891 (8th Cir. 1985). Further, “[t]o give effect to the principle that
 13 doubts regarding the propriety of release be resolved in favor of the defendant, the court
 14 is to rule against detention in close cases.” *United States v. Chen*, 820 F. Supp. 1205,
 15 1208 (N.D. Calif. June 18, 1992) (citing *United States v. Motamedi*, 767 F.2d 1403,
 16 1405-06 (9th Cir. 1985)). A review of the relevant statutory factors makes clear that the
 17 Government has not met its burden, and thus Mr. Willoughby should be released.

18 When determining whether the Government has proven that there are no
 19 conditions or combination of conditions that reasonably assure Mr. Willoughby’s
 20 appearance in court and protect the community, it must consider: (1) the history and
 21 characteristics of the person, including the person’s character, physical and mental
 22 condition, family and community ties, employment, financial resources, past criminal
 23 conduct, and history relating to drug or alcohol abuse; (2) the nature and circumstances
 24 of the offense charged; (3) the weight of the evidence against the person; and (4) the
 25 nature and seriousness of the danger to any person or the community that would be
 26 posed by the defendant’s release.

1 *1. Mr. Willoughby's History and Characteristics*

2 Mr. Willoughby's history and characteristics favor release. He was born in
3 Tacoma and is 35 years old. He and his four siblings spent much of their youth in foster
4 care. They grew up without a permanent home, cycling between foster parents, their
5 birth mother, and their grandmother. Mr. Willoughby's birth mother struggled with
6 chemical dependency, exposing the children to an environment where drug use was
7 open. In 1997, Mr. Willoughby and his siblings were adopted. *See* Exhibit 2 (Cronin,
8 M., *Fostering Hope*, Seattle Times, 12/28/97).

9 Despite his difficult childhood, Mr. Willoughby has accomplished much in life.
10 He has no juvenile criminal history. He graduated from Franklin High School in 2003.
11 Since then, he has worked hard to continue his education, taking community college
12 classes on automotive repair, business, real estate, and other subjects between 2003 and
13 2018. He completed the real estate course of study and is eligible to take the state
14 licensing test.

15 Mr. Willoughby has been active in community engagement in the last several
16 years. In 2019, he ran as a candidate for Seattle City Council, District 1. At candidates'
17 forums, he spoke about homelessness, involving youth in local politics, and the
18 importance of connecting people in the criminal justice system with services. His
19 mission statement was "promoting healthy minds and spirits."³

20 Also in 2019, Mr. Willoughby helped organize the first annual Seattle Sneaker
21 Ball, an event hosted by Sneaker Warz, an apparel company and lifestyle brand. A
22 portion of the proceeds from the event went to Redeeming Soles, a non-profit
23 organization that provides footwear to men, women, and children in need. The defense
24 team has spoken with the owner of Sneaker Warz who said that Mr. Willoughby could
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³See <https://www.seattlemag.com/news-and-features/seattle-city-council-primary-election-heating-part-1>

1 come back to work part-time. Like most businesses, the COVID-19 epidemic has
2 caused economic stress for the company.

3 Mr. Willoughby also has a strong employment history outside of his work with
4 the apparel brand and political activities. He worked at Les Schwab Tires before the
5 COVID-19 caused temporary layoffs. He is eligible to return to work when the
6 economy reopens.

7 *2. Mr. Willoughby's criminal history*

8 The Government and Pretrial Services pointed to Mr. Willoughby's criminal
9 history as a reason for detention. The Stanford Center on Poverty and Inequality found
10 that, by the end of 2015, the rate of incarceration for Black men ages 20-34 was 5.7
11 times the rate of incarceration for similarly aged white men.⁴ Mr. Willoughby is not a
12 stranger to the carceral system's disproportionate impact on Black men. His record, as
13 set forth in the Pretrial Services Report, consists almost exclusively of misdemeanor
14 convictions, and his only felony conviction is for a non-violent offense.⁵ The only
15 felony conviction was a 2007 Trafficking in Stolen Property conviction, for which he
16 was sentenced to work-release and community service. The rest of Mr. Willoughby's
17 record includes misdemeanor convictions dating to 2005. More than half of the charges
18 in the pretrial services report were dismissed. While he has several assault convictions,
19 most are fairly dated, having occurred between 2005 and 2010. The most recent assault
20 conviction took place in 2016, according to the pretrial services report.

21 Pretrial Services notes that Mr. Willoughby has pending warrants in several
22 cases, but the jurisdictions that issued those warrants did not place detainers for him
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25 ⁴https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2017_incarceration.pdf

26 ⁵ The Pretrial Services Report states that Mr. Willoughby was convicted of a second felony, Theft First Degree, in case King County Superior Court on 4/22/16. However, this is incorrect. In that case, he pled guilty to Theft Third Degree. *See* Exhibit 3 (Judgement, KCSC 16-1-01454-9).

1 when he was recently in the King County Jail. And those cases appear to involve
2 shoplifting-type allegations, because they are charged as theft in the third degree.

3 *3. Weight of the Evidence*

4 The strength of the Government's case is the least important among factors
5 considered under Bail Reform Act. *United States v. Motamedi*, 767 F.2d 1403, 1404
6 (9th Cir. 1985). In assessing the weight of the evidence, the Court may not make a
7 pretrial determination of guilt. *Motamedi*, 767 F.2d at 1408. Rather, the weight of the
8 evidence "can be considered only in terms of the likelihood that the person will fail to
9 appear or will pose a danger to any person or to the community." *Id.* Even when the
10 evidence strongly weighs in favor of conviction, release is nevertheless appropriate if
11 the community's safety can be "reasonably assured" by release conditions. *Id.*

12 *4. The Nature and Seriousness of the Danger Posed by Release*

13 With supervision and conditions, Mr. Willoughby is not a danger to others. He
14 has the opportunity to immediately work part-time if released and his brother supports
15 him. Pretrial Services is able to electronically monitor defendants using cell phone
16 technology that verifies the defendant's (not just the cell phone) location. He would
17 also abide by any drug/alcohol monitoring or treatment conditions. He knows that he
18 faces a serious sanction if found guilty and he has every incentive to abide by any
19 conditions this court imposes.

20 And as Exhibit 4 to the defense's memorandum for the detention hearing
21 demonstrates, courts have seen fit to release people facing the same charges stemming
22 from incidents involving more aggravated attacks (such as cases involving use of
23 Molotov cocktails.) While each detention assessment is individualized, these cases
24 reflect the reality that arson cases arising out of the protests do not present immitigable
25 risk of flight or danger.

1 5. *The COVID-19 epidemic provides yet another reason to release Mr.*
 2 *Willoughby.*

3 To be clear, Mr. Willoughby should be released independent of any concerns
 4 about the COVID-19 epidemic. The COVID-19 epidemic provides additional reasons to
 5 release Mr. Willoughby. Conditions at the FDC Seatac are much more austere due to
 6 the epidemic. Clients are frequently confined to their cells; they have limited access to
 7 the law library; and are unable to communicate easily with their attorneys.

8 While Mr. Willoughby does not have any chronic health conditions, the COVID-
 9 19 epidemic weighs in favor of release. It is impossible for inmates in jails to practice
 10 social distancing. COVID-19 has proven to have dire health consequences for even
 11 some young people who do not fall into high risk categories. Young and middle aged
 12 people are dying of strokes associated with COVID-19.⁶ While younger healthy people
 13 have lower hospitalization and mortality rates, they still can suffer severe complications
 14 from COVID-19.⁷

15 The COVID-19 concerns were not the focus of the prior detention hearing. Since
 16 then, the FDC Seatac has reported potential COVID-19 infections in three inmates.
 17 Given the inability for inmates to engage in social distancing, the number of infections
 18 is expected to rise. Despite all of the efforts by BOP, it has experienced huge COVID-
 19 19 outbreaks at multiple facilities, with several facilities reaching known infection rates
 20 in 70% of the inmates.

21 **IV. Conclusion**

22 This case was investigated and charged in state court. While it is a serious
 23 offense, the state court allowed Mr. Willoughby to post bond for his release. Under
 24 Washington sentencing guidelines, the mandatory sentencing range was relatively low,
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26 ⁶ See <https://www.washingtonpost.com/health/2020/04/24/strokes-coronavirus-young-patients/>

⁷ See <https://fivethirtyeight.com/features/why-are-some-young-healthy-people-getting-severe-covid-19/>

1 12-14 months. Now, the Department of Justice is simply using the cudgel of federal
2 mandatory minimum sentences to detain and imprison certain protestors. This Court
3 should resist such arguments and faithfully apply the standards in the Bail Reform Act
4 that presume release on bond, reserving detention for only rare cases.

5 Release is warranted, despite the allegations and despite his misdemeanor
6 criminal history. Accordingly, this Court should revoke the magistrate judge's detention
7 order and release Mr. Willoughby on an appearance bond.

8 DATED this 22nd day of July, 2020.

9 Respectfully submitted,

10 *s/ Dennis Carroll*

11 Assistant Federal Public Defender
12 Attorney for Isaiah Willoughby
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